Supreme Court, U.S.
F I L E D
NOV 8 1999

No. 99-422

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF
ABRAHAM WARSASKI, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner, Marshall Spiegal's ("Petitioner") motion for application for certiorari is a desperate attempt to concoct some constitutional argument and thereby obtain the jurisdiction of this Court. Petitioner's application should be denied in all respects.

Pointedly, petitioner *admits* that the constitutional provision cited as a basis for obtaining certiorari was never raised, at either the trial level, the intermediate appellate level or to the New York Court of Appeals (*see* petitioner's brief n.1). Hence, as fully detailed, *infra*, Petitioner's due process claims may not be raised for the first time on a petition for certiorari to this Court.

Moreover, it is abundantly clear from the Record that petitioner had more than ample opportunity to retain counsel of his own choosing. Indeed, the Trial Court's decision relieving petitioner's prior counsel, Richard Leng was dated May 29, 1997, four (4) months prior to the date the Trial Court scheduled for a trial. Petitioner intentionally omits the fact that in seeking admission *pro haec vice*, Mr. Meenan also sought an adjournment of the firm trial date. R 279[1]. In the Trial Court's correspondence denying the application, they specifically noted that the denial of the application was based, at least in part, upon adjournment of a firm trial date previously established by the Court. R 283.

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1. "R" references are to the Appellant Marshall Spiegal's Appendix submitted in connection with Spiegel's appeal from the Surrogate Court's Order and Decision to the Appellate Division of the Supreme Court, First Department.

Finally, the thrust of petitioner's argument, to wit: that the discretionary refusal by a state court judge denying a party's application for admission of an out-of-state attorney *pro haec vice* could ever result in a denial of due process is a reductio ad absurdum argument.

For all of the foregoing reasons, as well as those set forth below, it is respectfully submitted that the petition for certiorari be denied in all respects.

STATEMENT OF THE CASE

This case arises out of a proceeding before the Surrogate Court, New York County to admit the will of Abraham Warsaski to probate. Petitioner Marshall Spiegal, one of the sole surviving heirs of Warsaski objected to the admission of the will on the ground that Warsaski lacked testamentary capacity.

Throughout the pre-trial proceedings, Petitioner was represented by out-of-state counsel, Richard Leng, Esq. who was admitted *pro haec vice*. On or about May 22, 1997, Petitioner's counsel moved to be relieved as counsel, and this motion was granted by the Surrogate by order dated May 29, 1997. R 275-277, App. 4. In the order permitting Mr. Leng to withdraw, the Surrogate scheduled a firm trial date for September 5, 1997, and noted that, pursuant to 22 NYCRR § 520.11(b), Petitioner was required to retain New York local counsel if he wished to retain another out of state counsel. R 276.

Shortly thereafter, petitioner retained Joanne Rowland, a New York attorney as local counsel. Approximately one month following this Order, Petitioner sought to have a new

out-of-state counsel, Daniel C. Meenan, Jr. Esq., admitted *pro haec vice*, with the retention of local New York counsel, Joann Rowland, Esq. R 279. However, at the time Mr. Meenan moved for admission pro haec vice, he informed the court that he had a conflict with the September 5, 1997 firm trial date previously scheduled by the Surrogate and requested an adjournment to September 11, 1997. R 279.

By Order dated August 6, 1997 the Surrogate denied Mr. Meenan's request for an adjournment of the trial and his motion for admission *pro haec vice*. R 283, App. 2, pg.4. Specifically, the Trial Court observed that:

> This proceeding, however, has been pending for almost four years and objectant's former attorney conducted extensive pre-trial discovery. The matter was originally scheduled for trial in 1996, but was adjourned until March 1997, at which time it was again adjourned because of the actual engagement of proponent's counsel. Thereafter, objectant's former counsel sought leave to withdraw. By decision dated May 29, 1997, the attorney's application was granted and the proceeding was stayed so that objectants could retain new counsel. Such decision also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997. Thus, *the record clearly establishes that objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of trial date. Objectant's are responsible for their failure to promptly retain new counsel and adequately prepare for trial* (*Emphasis Supplied*).

Thus, Petitioner had approximately one month to retain counsel of his choice to represent him at trial. At trial, Petitioner was represented by Joann Rowland, Esq.

Following a full jury trial, the Surrogate granted a directed verdict dismissing the remaining objection and admitting the Will for probate. App 3-6. Surrogate Roth's decision and order was unanimously affirmed by the Appellate Division of the Supreme Court, First Department. App. 1-2. Petitioner's application for leave to appeal to the Court of Appeals was denied. App. 7. As set forth above, at no time, either at the trial or the two (2) appellate levels, did Petitioner ever raise the constitutional argument which petitioner is seeking to interpose here.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO RAISE OR ADDRESS THE ISSUE OF A FEDERAL DUE PROCESS VIOLATION IN THE STATE PROCEEDINGS

As this Court has repeatedly held, "in reviewing state court judgments under 28 U.S.C. § 1257 . . . [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997). *See also Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894 (1889), which held that

> at a minimum, . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state

> courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

As this Court has held, "[p]rinciples of comity in our federal system require that he state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." 451 U.S. at 495, 101 S. Ct. at 1893. Moreover, as this Court has held,

> [t]here are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

In this case, Petitioner failed to raise a federal due process claim or argument in any of the state court proceedings below. Petitioner's appellate brief to the Supreme Court, Appellate Division, First Department, fails to assert any federal issue, much less specifically raising a federal due process claim. It merely lists as one of the questions presented, whether the Surrogate's Court properly denied the motion of Mr. Meenan for admission *pro haec vice*. In the section of the brief dealing with this issue, Petitioner merely argued that the denial "prevented him from receiving a fair trial." Petitioner cited one New York State case in support of his contention that the Surrogate "should have fashioned any number of reasonable pre-requisites to the admission of out-of-state counsel given the circumstances."

In Petitioner's motion for leave to appeal to the Court of Appeals, *Petitioner did not even raise this issue* in the list of questions presented for review. The *only* question presented by Petitioner was whether Section 4519 of the New York Civil Practice Law and Rules (New York State's "Dead Man's Statute") was properly relied upon to preclude Petitioner to authenticate certain writings allegedly authored by the decedent, Mr. Warsaski.

Accordingly, Petitioner failed to properly raise his federal due process claim below, and pursuant to the compelling considerations discussed above, this Court should decline to grant certiorari on that claim now.

II.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO ADMIT OUT OF STATE COUNSEL IN ORDER TO AVOID A FURTHER ADJOURNMENT OF THE TRIAL

Even if this Court did have jurisdiction over Petitioner's claim, certiorari should nonetheless be denied, because the petition is based solely upon an inaccurate representation of the Surrogate's reason for denying the motion of Petitioner's out-of-state counsel for admission *pro haec vice*. Contrary to Petitioner's assertion that the Surrogate "provided no coherent rationale" for denying Mr. Meenan's motion, the record clearly reflects that the motion was denied because Mr. Meenan informed the Surrogate that he would be unable to begin the trial on September 5, 1997, the firm trial date that had been scheduled by the Surrogate in May, 1997, and requested an adjournment of the trial. Thus, the Surrogate denied Mr. Meenan's application for admission due to the fact that he had a scheduling conflict with the firm trial date previously set, not due to an arbitrary whim. Indeed, this reason is noted in the Decision and Order of the Supreme Court, Appellate Division, First Department, dated February 23, 1999, annexed to the Petition at App. 2, which stated, "[Petitioner] was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of objectant's request for an adjournment by reason of his out-of-state attorney's scheduling conflict."

Petitioner was well aware of this firm trial date in May 1997, four months before the trial and almost one month before Mr. Meenan sought to be admitted. In light of Petitioner's prior knowledge that the trial date was firm, the

Surrogate was well within her discretion to refuse to adjourn the trial of this matter, which had been pending for four years, in order to accommodate the scheduling conflict of an out of state counsel. Thus, even if the Court were to consider Petitioner's due process claim, the record clearly proves that the Surrogate properly exercised her discretion in denying the motion for admission *pro haec vice* due to out-of-state counsel's inability to begin the trial as scheduled.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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